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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1248

GTE SYLVANIA, INC., *et al.*,

Petitioners,

v.

CONSUMERS UNION
OF THE UNITED STATES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS CONSUMERS UNION OF THE UNITED STATES, INC. AND PUBLIC CITIZEN'S HEALTH RESEARCH GROUP

ALAN B. MORRISON
DIANE B. COHN
DAVID C. VLADECK

Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Respondents Consumers Union of the United States, Inc. and Public Citizen's Health Research Group

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BRIEF OF RESPONDENTS CONSUMERS UNION OF THE UNITED STATES, INC. AND PUBLIC CITIZEN'S HEALTH RESEARCH GROUP

This case involves the efforts of both the submitters of documents to a government agency and the requesters of those documents seeking access under the Freedom of Information Act to litigate their respective rights to prevent and obtain disclosure in the forum of their choosing. Peti-

tioners, submitters of the information, rely on basically two legal theories – the absence of a case or controversy under Article III of the Constitution and the doctrine of comity (joined only in the latter position by the Solicitor General) – in arguing that they have an absolute right to choose the forum for deciding this dispute because they won a race to the courthouse which, under their terms, the requesters would inevitably lose. Because neither legal doctrine is applicable here, and, because the solution offered by the Court of Appeals provides the best opportunity to resolve what the Solicitor General concedes is a difficult problem in judicial administration, the judgment below should be affirmed.

QUESTIONS PRESENTED

1. Does anything in Article III of the Constitution preclude a federal court from adjudicating a dispute where there is sufficient adverseness among the parties to ensure that all of the legal issues are presented in a concrete manner?

2. In selecting a forum to decide whether documents submitted to a government agency must be disclosed under the Freedom of Information Act, where the contest is between the submitter and the requester, must the court always select the forum in which the first party files?

STATEMENT OF THE CASE

1. Facts Giving Rise to the Litigation.

The respondent Consumer Product Safety Commission is an independent regulatory agency established by Congress in 1972 pursuant to the Consumer Product Safety Act, 15 U.S.C. §2051, *et seq.*[1] Its purpose is to implement the Act's policy of establishing "comprehensive and effective regulation over the safety of unreasonably hazardous consumer products." H.R. Rep. 1153, 92d Cong., 2d Sess. 26 (1972). Pursuant to its statutory mandate, the CPSC began an investigation in the spring of 1974 into accidents arising out of the manufacture and use of color television sets. To obtain the necessary information, it asked that all manufacturers of television sets sold in the United States submit to it all accident reports collected after the National Commission on Product Safety held hearings on the subject in 1969. 39 F.R. 10929 (March 22, 1974). (A. 36). Although a few manufacturers complied, the Commission determined that the response was insufficient, and accordingly it issued a special order on May 13, 1974, requiring various manufacturers, including the twelve who are petitioners in this Court, to make further submissions. *Id.* The Commission advised the manufacturers that their responses might be subject to disclosure under the Freedom of Information

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[1] Although formally denominated a respondent in this Court, the CPSC has aligned itself with the petitioners in arguing that the decision below was in error, except that it has not urged that there is no case or controversy as argued in Point I of petitioners' brief. *But see* Brief of CPSC at 21, n. 10. Despite their alignment with the petitioners, we will refer to the CPSC and its members, all of whom were joined as defendants in this action, collectively, as the "CPSC," the "Commission" or the "federal respondents."

Act, 5 U.S.C. §552 ("FOIA"), and asked them to designate which documents they believed were confidential. (A. 22, 37).

On June 14, 1974, respondents Consumers Union of the United States, Inc. and Public Citizen's Health Research Group (the "requesters") wrote the CPSC seeking access to the reports which had been submitted. (A. 16). Because a number of the manufacturers had claimed confidentiality, the request was denied as to any reports for which such a claim was made. (A. 37). However, because the CPSC concluded that the manufacturers had not sufficiently documented their claims, the Commission so advised them in August 1974 and asked for further substantiation. (A. 22, 37). Despite the fact that the requesters had the right to sue immediately under the FOIA because the documents had not been "promptly" disclosed, 5 U.S.C. §552(a)(3), they chose instead to let the administrative process take its full course. In addition, they also narrowed their request to exclude both matters within the attorney-client privilege and the names and addresses of accident victims. (A. 17).

In the interim, the manufacturers and the CPSC had a number of exchanges regarding both the responsiveness of the manufacturers to the special orders and the adequacy of the substantiation offered for their nondisclosure claims. The requesting parties still chose not to sue. Instead, on November 5, 1974, they met with officials of the CPSC to discuss the processing of their FOIA request. At that meeting the agency informed the requesters that it was anticipated that a decision on disclosure would be made by mid-March 1975. Therefore, on November 18, 1974, the requesters notified the CPSC that they would not exercise their right to sue on the understanding that their request would be processed as promised. They specifically reserved the right to sue should any further delay result. (A. 17).

On March 28, 1975, the CPSC announced that it had concluded that none of the requested documents fell within any of the exemptions to the FOIA, and therefore they were subject to mandatory disclosure. In addition, the CPSC found that, even if the documents fell within an exemption, the public interest in health and safety required that the documents, as redacted to eliminate the names and addresses of accident victims and attorney-client information, should be made available. However, instead of releasing the documents immediately, the CPSC gave the manufacturers until May 1, 1975, to obtain any needed relief from the courts. (A. 17–18, 38).

2. District Court Proceedings

Although the mid-March deadline for disclosure had not been met, the requesters still chose not to sue. And, when the CPSC announced its decision not to release the documents until May 1st, they did not go to court to contest the additional delay. Instead, they awaited the decision of the manufacturers, again in the hope of avoiding litigation.

Having the choice between disclosure and litigation, thirteen manufacturers took the latter option, bringing suits in four different jurisdictions. Eight of the manufacturers originally filed in Delaware, three in the Southern District of New York, and one each in the Northern District of New York and the Western District of Pennsylvania. (A. 18). In each case the submitters obtained a temporary restraining order prior to the May 1 deadline, either with the consent of the CPSC or by court order. Thus, the documents pertaining to those companies which sued were not released, but those from the others were made available.

The requesters were then faced with a difficult choice: they could do nothing and allow the CPSC to represent their interests; they could seek to intervene in Delaware;

or they could file their own suit in the District of Columbia. In considering their options, they recognized that intervention in Delaware would be far less convenient than litigating in the District of Columbia where their counsel had offices and where both groups maintained their staffs. They also believed that, on balance, their likelihood of success in the District of Columbia was greater than in Delaware, particularly since the latter court had already granted petitioners temporary restraining orders. Furthermore, at that time, actions were pending in four different jurisdictions which might have entailed multiple interventions if that path had been chosen.

The requesters were also aware that although the inconvenience was not extraordinary in this case, the next case might involve a reverse FOIA action filed in Hawaii, for which the problems of cost and accessibility would be much greater. Since both requesters had long-standing interests in access to information, not simply from the CPSC, but from many government agencies, they concluded that intervening in Delaware would set an adverse precedent and that this case offered an opportunity to establish that submitters of information could not automatically elect the forum in which contests such as this would be decided.

It was for these reasons that the requesters chose to bring suit on May 5, 1975, in the United States District Court for the District of Columbia. (A. 1). In addition to naming the CPSC, its members, and its Executive Director as defendants, the requesters joined all thirteen manufacturers who had previously filed suit as additional defendants pursuant to Rule 19 of the Federal Rules of Civil Procedure. (A. 16).

Subsequent to that date, the federal defendants in the five actions which were not brought in Delaware moved to have those cases transferred to the District of Delaware,

where the other suits had been filed, and where, fortunately for the CPSC, all thirteen manufacturers are incorporated. (A. 39). Although eight of the manufacturers had elected to sue in Delaware, it is not the principal place of business of any of them, nor of any of the other five. Moreover, all of the requested documents were physically in Washington, D.C., none of the principal witnesses were in Delaware, and all of the principal counsel for both the CPSC and the submitters were either in Washington or elsewhere besides Delaware. Although the government could have moved to transfer all thirteen actions to the District of Columbia pursuant to 28 U.S.C. §1404(a), since venue would also have been proper there under 28 U.S.C. §1391(e),[2] it did not even attempt to do so and thereby consolidate the reverse cases with the direct FOIA action brought by the requesters. Thus, the five non-Delaware cases were all transferred to Delaware and consolidated with the eight pending there.[3] Moreover, despite the fact that Rule 65(b) of the Federal Rules of Civil Procedure provides that temporary restraining orders shall last only ten days, plus a single ten-day extension, the CPSC consented in every case to continue them until the hearing on the motions for the preliminary injunction, which did not occur until July 23, and then until the court could decide those motions.

In addition to failing to attempt to consolidate all of the pending litigation, including that brought by the requesters, in a single forum, the CPSC also failed to make any effort

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[2] *See GTE Sylvania v. Consumer Product Safety Comm.*, 438 F. Supp. 208, 210-211 (D. Del. 1977) (Pet. App. A111).

[3] One of the cases was subsequently dismissed voluntarily, and hence there are only twelve submitters remaining. (Pet. App. A109, n. 1).

to join the requesters in Delaware under Rule 19. The submitters had neither named the requesters in their complaint, nor explained their absence as Rule 19(c) requires, and neither the CPSC nor the court carried out their independent responsibilities to attempt to bring all parties into the Delaware forum to litigate the issues there. Instead of utilizing either section 1404(a) or Rule 19, the manufacturers and the CPSC moved in the District of Columbia to dismiss this action or to hold it in abeyance pending the outcome of the proceedings in Delaware. As grounds for dismissal, they urged that, despite the presence of the manufacturers, there was no case or controversy under Article III of the Constitution with respect to the underlying cause of action because the CPSC and the requesters agreed that the documents were not exempt from disclosure. In addition, both the submitters and the government argued that because the Delaware actions were filed first, and there were temporary restraining orders outstanding in them, the District of Columbia case should be stayed until the cases in Delaware were decided. The requesters responded to these motions, and on June 30, 1975, filed their own motion for summary judgment. (A. 2).

Without hearing oral argument, the District Court agreed with the defendants, and on September 11, 1975, issued its opinion and order dismissing the case on the ground that there was no case or controversy with respect to the CPSC. (A. 26). It further concluded that there was no cause of action or independent basis of subject matter jurisdiction with respect to the manufacturers and hence that the case could not proceed against them either. (A. 29). Shortly thereafter, on October 23, 1975, the District Court in Delaware entered an order preliminarily enjoining the CPSC from release of the documents. *GTE Sylvania, Inc. v. Consumer Product Safety Comm.*, 404 F. Supp. 352 (D. Del. 1975) (Pet. App. A71-107).

3. Proceedings in the District of Columbia Circuit

The requesters promptly appealed to the United States Court of Appeals for the District of Columbia Circuit, both because of their belief that the decision below was erroneous and because of the adverse precedent that it would set with respect to future forum shopping contests between submitters and requesters. Thus, on November 3, 1975, they filed a motion for summary reversal which was denied without opinion on February 19, 1976. (A. 5-6). Subsequently, briefs were filed on the merits, and on September 21, 1976, the court of appeals heard oral argument pursuant to the expedited review provisions of the FOIA, 5 U.S.C. §552(a)(4)(D).

More than nine months later, on July 5, 1977, the appellate court issued its opinion, written by Judge Wright, joined by then Chief Judge Bazelon and Judge Robinson, reversing the decision of the district court and directing the court to proceed to the merits of the controversy. With respect to the claimed absence of a case or controversy, the court noted that the CPSC had not given the requesters access to the documents, and that, at least as to the effect of the temporary restraining orders in Delaware, there was a genuine dispute between the CPSC and the requesters. (A. 42). It thoroughly reviewed the history of the case and concluded that the requisite adverseness for Article III purposes was present. (A. 44).

The court then considered the remaining comity argument which had been advanced by the defendants below but had not been reached by the district court. It observed that in the nearly two years since the preliminary injunction had been entered in Delaware, nothing further had taken place. (A. 45). The court noted that, although the CPSC's appeal from the preliminary injunction had been dismissed, no one had proceeded to obtain a final judgment.

Id. The court then pointed out that nearly a year later, a minute order had been entered by the Chief Judge of the District of Delaware "closing out" the consolidated Delaware reverse FOIA action, (A. 46, 55), and concluded that although the case "was not dismissed in form, it was dismissed in fact and by acquiescence of the parties the matter was dropped." (A. 47). Based upon these factors, the court concluded that the actions in Delaware were "dead." *Id.*

The court did not, however, rely solely on the lack of any further action in Delaware as a basis for directing that the case be heard in the District of Columbia. It pointed to the absence of the requesting parties in Delaware (A. 48), and it remarked that the Commission had been "less than vigilant" in litigating in Delaware, concluding that the "pro-disclosure position was all but unrepresented" there. (A. 48). Based upon this and the fact that the entire controversy could properly be adjudicated in the District of Columbia where all parties were present, it directed the parties to proceed to the merits.

The decision in the District of Columbia produced a renewed flurry of activity in Delaware. (A. 59). A hearing was convened at which the court, after stating that the case was not dead, set discovery deadlines and established a trial schedule. Thereafter, the CPSC, more than two years after the reverse actions were filed, finally moved to transfer the twelve Delaware cases to the District of Columbia. Not surprisingly, the court rejected that plea as untimely, particularly in light of the representation that was made by the Commission in its earlier motions to transfer the five non-Delaware cases – which had been made after the D.C. case had been filed – that the Delaware forum would be an appropriate one. (Pet. App. A115). However, the Commission still did not move under Rule 19 to join the requesters in the Delaware action, despite the fact that the D.C. Circuit emphasized the absence of the requesters in the Delaware cases and that the Rule 19 issue has been fully briefed by the requesters in the D.C. Circuit.

Petitions for rehearing and rehearing *en banc* were filed by the manufacturers, and on August 25, 1977, the court denied them. (A. 58–61). In doing so, it recognized that the proceedings had not been formally concluded in Delaware, but it nonetheless determined that the action should proceed immediately to the merits in the District of Columbia where, in contrast to Delaware, all of the parties had been joined. Recognizing that the requesters were entitled to an expedited hearing on their claims under the FOIA, the court observed, as it turned out, very optimistically, "at long last, so be it." (A. 60).

4. Initial Proceedings in This Court.

The manufacturers then obtained a stay of the mandate in the D.C. Circuit, and on October 3, 1977, filed a petition for a writ of *certiorari* in this Court, No. 77-508. In their petition, they urged this Court to consider the issues relating both to the alleged absence of a case or controversy under Article III and the court of appeals' failure to defer to the district court in Delaware. After considerable delay, the CPSC filed its memorandum, opposing the grant of *certiorari* at that time, although indicating its view that the court of appeals was in error in failing to defer to the Delaware court. It did, however, make one concession: on "further reflection," it concluded that indeed there was a sufficient case or controversy for purposes of Article III and withdrew its prior position on that point. (CPSC Br. in 77-508 at 5).

On December 8, 1977, after the requesters had filed their opposition, the district court in Delaware made its preliminary injunction permanent. Petitioners then urged this as a further reason for granting the writ, or, in the alternative, for summary reversal of the decision below in order to allow the D.C. Circuit to re-consider its position in light of the entry of a final order in Delaware. On January 16, 1978, this Court granted *certiorari*, summarily vacated the decision below, and remanded it for further consideration in light of the entry of the permanent injunction in Delaware. (A. 62). 434 U.S. 1030 (1978).

5. Proceedings on Remand in the D.C. Circuit

On remand both the requesters and the submitters filed motions asking the court to establish a briefing schedule. Nothing further took place until September 20, 1978, when the court, *sua sponte*, issued an order providing for the submission of briefs within twenty days. (A. 11). Short extensions were obtained, and after all submissions were made, the court issued a new opinion on December 22, 1978, affirming its prior determination that the case should proceed to a decision on the merits in the District of Columbia.

After reviewing the history of the litigation, Judge Robinson's opinion reiterated the panel's prior conclusion that there was a case or controversy before the district court (A. 72), noting the CPSC's concession on this point in the Supreme Court. *Id.* at n. 33. The court then considered the various theories under which the district court might be barred from proceeding to the merits in light of the actions in Delaware. (A. 73). First, it considered the possibility of applying the doctrine of *stare decisis*, but found that its application was optional, and it declined to require

that the district court follow the rulings in Delaware without conducting its own independent examination. *Id.*

Next it considered whether collateral estoppel could bind the requesters in spite of the fact that they were not parties in Delaware. Initially, it recognized the constitutional due process problem in so ruling and observed that rarely, if ever, would non-parties be bound by a prior decision. (A. 74). It then observed that such preclusive effect would be particularly inappropriate here since the interests of the CPSC and the requesters "diverge markedly." (A. 75). The court pointed out a number of respects in which, although formally aligned with the requesters, the CPSC's interests were not congruent with those of requesters in general, or even the requesters in this particular case. *Id.* at nn. 40 and 42.

Finally, the court considered the issue of comity which had been most heavily relied on by petitioners. It recognized the general applicability of the doctrine, but it observed that it "surely does not contemplate that fundamental rights of citizens will be adjudicated in forums from which they are absent." (A. 77). For reasons previously noted, it declined to rule that the CPSC would adequately protect the interests of the requesters and found that the FOIA, including its liberal venue provisions, reinforced the right of the requesters to litigate the matter in a forum of their choosing. It suggested a number of procedural devices, including 28 U.S.C. §1404(a) and Rule 19, and noted the duty of the parties in Delaware to attempt to utilize them to accommodate the interests of judicial efficiency. (A. 78–82).[4] The court then addressed the issue of whether

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[4]The court also suggested the possibility that a defendant class of all requesters might be named to obtain preclusive effect for any

the requesters could be required to intervene in Delaware in lieu of commencing their own action in the District of Columbia. Relying on the FOIA and other authorities, the court ruled that mandatory intervention would be inappropriate (A. 84), and, based upon this and its prior rulings, concluded that the requesters could have their case adjudicated on the merits despite the permanent injunction in Delaware. (A. 86).

6. Further Proceedings in This Court.

Once again the manufacturers obtained a stay of the mandate, and on February 12, 1979, they filed their second petition for a writ of *certiorari* with respect to all of the issues initially presented, not simply those suggested by this Court's remand order. Once again the CPSC did not file a petition, concluding that review by this Court was not yet necessary in light of the fact that the appeal from the final decision of the district court in Delaware had not yet reached a decision in the Third Circuit. The government did agree, however, that the court below was in error in refusing to apply the doctrine of comity.

On the day that the brief of the requesters was to be filed, the Court of Appeals for the Third Circuit affirmed the grant of the permanent injunction issued by the Delaware court. *GTE Sylvania Inc. v. Consumer Product Safety Comm.*, 598 F.2d 790 (1979). On that appeal, the requesters, over the objection of the manufacturers and the CPSC, had filed an *amicus* brief urging the court of appeals to vacate the lower court decision because of the failure to

judgment in Delaware. Requesters believe that no such class proceeding would have been necessary in this case, and without conceding that preclusive effect could ever be obtained, do not urge the possible use of a defendant class to resolve the problem of the appropriate forum for this kind of litigation.

comply with Rule 19. The court of appeals determined not to accept the invitation to vacate, viewing the request as one which would require Rule 19 to be applied in all direct and reverse FOIA cases where there are known requesters or submitters. *Id.* at 798. However, the court did recognize the interest in judicial efficiency in consolidation, and it assumed that, because the requesters were parties coming within the terms of Rule 19(a)(2), failure to join them subjects the CPSC to "a substantial risk of incurring inconsistent obligations with respect to disclosure of the TV-related accident data." *Id.* Nevertheless, the court declined to apply Rule 19 in view of the fact that the interest of the manufacturers in preserving their judgment was strong, an interest further cemented by the fact that the court then proceeded to consider and affirm the merits of the decision below. In declining to vacate, the court observed that "it may have been appropriate for the district court to have dismissed the action or transferred it to the District of Columbia upon consideration of the Rule 19 issue prior to its entry of final judgment," but that subsequent events had shifted the balance to warrant a different result. *Id.* at 799.

The manufacturers then filed a supplemental memorandum in this Court which attached the opinion of the Third Circuit. Although that court did not specifically disagree with the merits of the D.C. Circuit's ruling, the affirmance of the permanent injunction increased the likelihood that there would be either inconsistent rulings or duplicative efforts in the D.C. Circuit. It was after this latter submission, without further memoranda from either the CPSC or the requesters, that this Court granted review on May 14, 1979.[5]

[5]The government has indicated that a petition for a writ of *certiorari* will be filed from the decision in the Third Circuit, which is in

SUMMARY OF ARGUMENT

Petitioners advance two distinct legal theories to justify their claimed right to select the forum for this litigation based solely on a race to the courthouse. Because neither precedent nor sound policy supports either theory, the court of appeals properly rejected them.

Petitioners' first argument – that there is no case or controversy under Article III – rests on decisions such as *Muskrat v. United States,* 219 U.S. 346 (1911), where the only parties to the action agreed on the result, and hence the lawsuit was little more than "a feigned controversy" or an "amicable action." *Lord v. Veazie,* 49 U.S. (8 How.) 250, 255 (1850). In this case, while the requesters and the CPSC agree that the documents should be released, they sharply disagree over the effect of the prior Delaware action. More importantly, the joinder of the submitters as defendants in this action brings before the court parties who disagree on whether the TV accident reports must be disclosed and thereby produces the "concrete adverseness which sharpens the presentation of issues on which the Court so largely depends for illumination of difficult . . . questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962).

Indeed, even in less compelling cases, where persons with adverse interests were not joined as parties, this Court has decided important legal issues, including constitutional questions, either with the aid of an *amicus, United States v. Lovett,* 328 U.S. 303 (1946), or by curing the difficulty

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direct conflict on the merits with the decision of the Second Circuit in *Pierce & Stevens Chemical Corp. v. Consumer Product Safety Comm.,* 585 F.2d 1382 (1978). (CPSC Br. 38, n. 20). The time for filing that petition has been extended a second time until September 27, 1979.

through intervention, *Pasadena City Bd. of Educ. v. Spangler,* 427 U.S. 424 (1976). Petitioners' overly restrictive view of the requirements of Article III is also seriously undermined by their concession that there would be a case or controversy if the requesters had intervened in Delaware, even though the same parties would be litigating the same legal issues and the only change would be that the requesters and petitioners would have switched positions in the caption of the case.

To conclude that Article III requires dismissal would accomplish little in future cases since requesters could always insure a dispute with an agency by including in their request some documents for which denial seems likely, instead of compromising as requesters did here. The result urged by petitioners could also be avoided if the requesters filed their action before the agency reached its decision, but after the FOIA's relative short time limits for a response had expired. Such a course of action would produce unnecessary burdens on all concerned, with no clear benefit to anyone other than the requester who would be assured of the forum of his or her choosing.

The second argument made by petitioners, in which they are joined by the CPSC, is that the prior orders in Delaware should have precluded the court of appeals from directing the action to go forward on the merits in the District of Columbia. The fundamental flaw in this argument is that it equates this case with one in which a final judgment had been entered in Delaware, and affirmed on appeal, before the complaint had been filed in the second action. While admittedly the Delaware case has proceeded to judgment, that is entirely due to the decisions of petitioners and the CPSC to proceed in Delaware without attempting to join the requesters, while simultaneously resisting efforts to have this

controversy decided in the District of Columbia where all interested parties are present. Thus, in determining the proper forum for adjudicating the dispute, fairness requires that the focus be on the balance of equities as they stood when the complaint was filed in the District of Columbia, not as they presently appear. And in striking that balance, the scales should not be tipped in favor of the submitters by virtue of their having obtained temporary restraining orders before the instant case was filed, since petitioners and the CPSC concede that the entry of such orders were in this case, as in all reverse cases, virtually automatic.

In support of their argument that the D.C. action was properly dismissed, petitioners and the CPSC rely on the doctrine of comity and the fact that the reverse cases were filed first. Such reliance is misplaced primarily because comity applies only when the parties are identical, *Great Northern Ry. Co. v. National RR. Adjustment Bd.*, 422 F.2d 1187, 1193 (7th Cir. 1970), and the requesters were never joined or attempted to be joined in Delaware, whereas all parties are present in the District of Columbia. Because due process precludes giving a judgment binding effect on persons who are not parties to an action, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971), there was no reason to apply comity here because the result in Delaware cannot preclude the requesters from litigating their claim in the District of Columbia.

The reliance of petitioners and the CPSC on cases recognizing an exception to the general rule in which non-parties have been bound is also misplaced because, as this Court has recently demonstrated, that exception is extremely narrow. *State of Montana v. United States*, 99 S. Ct. 970 (1979). Whatever the scope of that exception may be, it would be improper to apply it here where its principal justification – adequate representation in the earlier action – is lacking. Because the CPSC is primarily a stakeholder in this case, and because it, like all federal agencies, has interests in FOIA litigation which "diverge markedly" (A. 75) from those of requesting parties, it is doubtful if its representation could ever be sufficient to bind non-consenting requesters who are not parties to a reverse FOIA case. Indeed, in this litigation, the CPSC both took and failed to take a number of actions which, while they may have been appropriate from its own perspective, surely were detrimental to the interests of the requesters.

To allow comity to bar this case from proceeding to the merits gives the submitters an absolute choice of forum, since only they will know whether they will acquiesce in an agency's decision to release documents, and hence they can always win the race to the courthouse. There is no indication that Congress ever intended to confer such an important advantage on persons who are not even made beneficiaries of the FOIA. *Chrysler Corp. v. Brown*, 99 S. Ct. 1705 (1979). Submitters may be entitled to "an equal start in the race to the courthouse, [but] not a headstart." *Kerotest Mfg. Co. v. C-O-TWO Fire Equipment Co.*, 342 U.S. 180, 185 (1952).

Petitioners' suggestion that a race to the courthouse alone should resolve the forum dispute is an overly rigid approach which should be rejected because it will produce unfairness to litigants (both requesters and submitters), will unnecessarily interfere with the administrative process, and unduly burden the federal courts. If a race to the courthouse is to be the method of deciding the proper forum, requesters in future cases will win most races since they will have the advantage of the strict time limits of the FOIA which agencies rarely meet. Thus, except in this instance where the request-

ters allowed the administrative process to run its course in an effort to avoid litigation, it will be the requesters who will file first to protect their choice of forum. But regardless of who wins the race, it is not sound policy to decide issues of the appropriate forum for litigating controversies such as this solely by a race to the courthouse where one side or the other, under the rules of the race, cannot win. Moreover, making forum decisions turn on the winner of such a race unnecessarily interrupts the administrative decision-making process and prematurely burdens the federal courts.

Rather than a rigid first to file rule, the federal courts should deal with each case individually, utilizing the remedies available under Rule 19 and 28 U.S.C. § 1404(a) to attempt to consolidate all of the litigation in a single appropriate forum. While this solution may not solve all problems in all cases, its flexibility offers the best chance of resolving the question in an equitable, rather than arbitrary manner, taking into account the interests of the litigants and the courts.

ARGUMENT

I. THERE EXISTS SUFFICIENT ADVERSENESS TO SATISFY THE CASE OR CONTROVERSY REQUIREMENT OF ARTICLE III.

Pursuant to the Freedom of Information Act, the requesters have sought access to television-related accident reports submitted by petitioners to the CPSC. The CPSC has processed the request and has to this date declined to make the documents available. Section 552(a)(4)(B) of Title V

provides that the district courts shall have jurisdiction to enjoin an agency such as the CPSC from withholding records from any person who has requested and been denied access to them. Since the requesters have sought and been denied access to the documents at issue here, they have a valid claim under the Act. Despite this fact, petitioners contend that the issue of the requesters' entitlement to the documents cannot be litigated because the case or controversy requirement of Article III of the Constitution prohibits it.

Petitioners' constitutional theory is based on the fact that the CPSC has examined the documents and concluded that they are not subject to withholding under any of the permissive exemptions to the FOIA, and that, moreover, even if they were exempt from mandatory disclosure, the CPSC would release them since they contain matters of public interest. (A. 23-24). According to petitioners, because the CPSC agrees with the requesters on the scope of the FOIA's exemptions, Article III precludes a court from deciding whether the documents must be turned over in the face of the Delaware injunction precluding disclosure. The CPSC concedes that there is Article III jurisdiction because of a live dispute as to the legal effect of the temporary restraining order, preliminary injunction, and now permanent injunction entered in Delaware, a dispute in which the government sides with petitioners against the requesters. (CPSC Br. 21, n. 10). Thus, despite this continuing disagreement as to the effect of the Delaware orders, the manufacturers contend that there is no case or controversy in the District of Columbia, even with the joinder of petitioners who oppose the requesters on virtually every issue in the case.

In discussing the meaning of the terms "case or controversy" in Article III, this Court has described them as "limit[ing] the business of federal courts to questions presented in an

adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The requirement of adverseness, as the petitioners themselves note (Br. 22), "assures sound adjudication based on a full presentation of facts and arguments, for it is the 'concrete adverseness which sharpens the presentation of issues on which the court so largely depends for illumination of difficult . . . questions.' *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974), *quoting Baker v. Carr*, 369 U.S. 186, 204 (1962)." Or, as this Court observed in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937), a case dealing with the constitutionality of the Declaratory Judgment Act, Article III can be invoked only when there is "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothethical state of facts."

Requesters respectfully submit that there is sufficient adverseness in this proceeding to give the courts the requisite illumination on all of the procedural and substantive issues on which they must pass judgment. Surely, this is neither "a feigned controversy" nor an "amicable action," *Lord v. Veazie*, 49 U.S. (8 How.) 250, 255 (1850). Nor is this a collusive lawsuit in which there are no truly adverse parties, such as *Muskrat v. United States*, 219 U.S. 346 (1911), on which petitioners rely. While it is true that the requesters and the CPSC agree that none of the FOIA exemptions applies, this case differs from every one of those relied on by petitioners because in none of those actions was a third party joined who had the adverseness required to assure the presentation of both sides of the controversy to the court.

The importance of the presence of third parties is clearly demonstrated by the two parallel cases before this Court in-

volving the Charlotte-Mecklenberg School System. On the same day that this Court dismissed *Moore v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 47 (1971), for lack of a sufficient case or controversy, it decided the same issues in *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971), because in the latter case there were parties representing both sides of the controversy rather than only those who sought an identical resolution of it. Even more to the point is *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976), where, although the case between the original parties had become moot, the intervention of the United States enabled this Court to proceed to decide the merits. *Id.* at 430-431. Since all of the parties to the instant controversy do not desire the same result, none of the authorities relied on by petitioners is relevant to this case, and there is sufficient adverseness to satisfy the purposes of the constitutional minimum contained in Article III.[6]

This Court has never taken the narrow, hyper-technical view urged by petitioners in deciding whether to adjudi-

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[6] *United States v. Johnson*, 319 U.S. 302 (1943), another authority relied on by petitioners, is a further illustration of a collusive suit seeking a federal court adjudication on the constitutionality of a congressional statute on grounds of excessive delegation of the legislative power. The United States intervened at the district court level to defend what was obviously a sham lawsuit, since the party nominally opposing the declaration of unconstitutionality was a straw for the other side. This Court ruled that the initial suit should have been dismissed because it lacked the requisite adverseness. It did not address the question of whether the case could have proceeded had the United States been properly joined as a party in an action seeking a declaration that the statute was unconstitutional. Indeed, such an action plainly would have been proper with or without the "straw." *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D. D.C. 1971) (three-judge court).

cate a live dispute. Perhaps the most striking demonstration of this is *United States v. Lovett*, 328 U.S. 303 (1946). There, three individuals challenged a federal statute on the ground that it constituted a bill of attainder, since it denied them compensation for work done for the government because of certain of their activities of which Congress disapproved. In the lawsuit brought in the Court of Claims to recover their back pay, the individuals and the Department of Justice agreed that the law was unconstitutional and that their claims should be paid. Nonetheless, both the Court of Claims and this Court adjudicated the merits of the controversy, after allowing Congress to file a brief in support of the constitutionality of the law. Despite the fact that all the named parties were in total agreement on the merits, no one argued that this Court lacked jurisdiction under Article III. We respectfully submit that if this Court had the power to decide the constitutional issues in *Lovett*, the federal courts have the power to decide the requesters' statutory entitlement to access to these documents under the Freedom of Information Act.[7]

Not only is the position of the petitioners unsupported by authority, but it would produce results at variance with the common understanding of the operation of the federal

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[7] In two deportation cases, where the issue before this Court was jurisdictional, and the alien and the government agreed on its outcome, but the courts of appeals had found to the contrary, this Court proceeded to decide the question in each case with the aid of an *amicus*, in one case appointed by this Court for that purpose, *Cheng Fan Kwok v. Immigration & Naturalization Service*, 392 U.S. 206, 210 n.9 (1968), and in the other where the *amicus* appeared on its own, *Foti v. Immigration & Naturalization Service*, 375 U.S. 217 (1963). *See also Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978) (claimants and government agreed on merits of unconstitutionality of legislative veto and court, with the assistance of Congressional *amici*, decided the issue).

courts and would unduly burden litigants and judges. The issue, according to petitioners, is the power of the court to decide these questions under Article III, a power which cannot be conferred on the courts by consent. If their position is valid, it is difficult to understand the basis upon which the Securities and Exchange Commission or the Antitrust Division of the Justice Department can ever obtain a consent decree, especially when that decree is filed with the complaint. Indeed, once there is agreement at any time during a lawsuit, if the petitioners' theory is accepted, there is no longer any case or controversy, and the federal courts would lose the power to enter an order making the agreement into a binding order. In a Freedom of Information Act case, therefore, it would be "unconstitutional" for a court to enter an order, with the consent of the government, directing it to release the documents at issue. In short, the court would have the power only to enter litigated, but not consented to, judgments.

Similarly, the court would not have the power to reverse an order where, on appeal, one of the parties confessed error, because if there was agreement, there would be no jurisdiction. This notion is directly refuted by this Court's actions in *Sibron v. New York*, 392 U.S. 40 (1968), in which the District Attorney confessed error in this Court, and the Court nonetheless declined to accept it, and proceeded to make a judgment on its own as to whether error had taken place. Surely, if petitioners were correct, this Court would have had no jurisdiction to make any independent examination on its own before agreeing that the search at issue was invalid. Even less constitutionally permissible would have been the actions of the Chief Justice, Justice White, and Justice Rehnquist dissenting from a confession of error in *Rosengart v. Laird*, 405 U.S. 908 (1972), yet no one has ever questioned the permissibility of such practices under Article III.

Petitioners' strained interpretation of Article III would also void the Federal Interpleader Act, 28 U.S.C. § 1335, in a number of instances. That statute permits an action to be brought by a stakeholder "even though he believes only one [claim] is meritorious." *Hunter v. Federal Life Ins. Co.*, 111 F.2d 551, 556 (8th Cir. 1940). Typically, in an interpleader action, the plaintiff agrees that one person is entitled to a sum that is held, but the limitation on Article III suggested by petitioners would virtually eliminate the utility of interpleader except perhaps as a defensive measure. Once again, it is difficult to comprehend what purpose served by Article III would be advanced by the narrow construction of the case or controversy requirement which petitioners have urged.

Although in this case the requesters and the CPSC have agreed that all of the documents covered by the complaint should be disclosed, the much more typical FOIA case involves a set of documents, some of which the agency agrees to release, while others remain in dispute. In such a situation, it is unclear what, under the petitioners' view, Article III would permit in a suit in which the agency, the requester, and the submitter were parties. Could a federal court decide all of the questions presented even though there is agreement between the requester and the agency as to some documents, or would it have to rule on only those over which the requester and the agency disagreed, leaving the remaining issues to be litigated in a reverse FOIA case? In the latter situation, presumably the court in the reverse case, for similar Article III reasons, could not decide the disclosability of any documents as to which the submitters and the agency were in agreement, thus assuring two separate actions, considering different portions of the same documents.

On the other hand, if the requesters could obtain a court order with respect to all of the documents so long as a portion of one of them was in dispute, the position urged by petitioners here would be largely meaningless because in almost every case there is the potential for *some* dispute. In fact, in this instance there would have been a dispute, but for the willingness of the requesters to narrow their request to eliminate certain materials. (A. 17). Surely, in the future no well-informed requester will agree to any such compromise if the effect is to deny that person the right to litigate the disputed claim in a forum of his or her choosing.

The heart of petitioners' argument is that here the CPSC actually determined that the requested documents should be released and agreed to do so. Therefore, presumably no such Article III bar would have existed when the CPSC was still considering whether to release the documents. If that is the case, the requesters could have brought suit at any time after the initial denial, and also could have filed after the agreed-upon mid-March deadline had passed before a CPSC decision had been announced. Yet by agreeing to allow the administrative process to run its course, petitioners contend that because of Article III, the requesters have forfeited their right to bring their own lawsuit in a federal court. If that is so, the manufacturers' position can only encourage further litigation and future refusals by requesters to allow the administrative process to be completed.

Finally, petitioners have never satisfactorily explained the inconsistency between their Article III position here and their repeated urgings that requesters intervene in Delaware and have their claims decided there. Presumably, such intervention would have to be as a defendant, since otherwise the same lack of case or controversy would preclude

the requesters from being a plaintiff in Delaware against the CPSC, just as it would prevent them from being a plaintiff against the CPSC in the District of Columbia. As a defendant, however, they would wish to raise a cross-claim against the CPSC to insure the actual release of the documents once that litigation was concluded. Again, the question arises as to whether Article III would permit that kind of cross-claim under petitioners' theory.

But assuming that all of these difficulties can be surmounted, and that somehow the requesting parties could have their claims adjudicated in Delaware, it is difficult to comprehend how Article III of the United States Constitution can be satisfied in Delaware where three sets of parties are litigating certain issues, and yet the same provision of the Constitution precludes a federal court from adjudicating the same controversy involving the same sets of parties and the same issues in the District of Columbia, simply because the requesters and the submitters have reversed their designations as plaintiffs and defendants. In the context of the Declaratory Judgment Act, this Court has rejected any such formalistic approach, observing that "the character of the controversy and of the issue to be determined is essentially the same whether it is presented by the insured or by the insurer," *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 244 (1937). *See also Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941) (finding that it is "immaterial" that the normal positions of the parties are reversed.) No purpose underlying Article III would be served by applying it to prevent the action brought in the District of Columbia from going forward, but not applying it to preclude adjudication of the same controversy in Delaware.

As this Court noted in discussing another aspect of the meaning of case or controversy, a federal court "cannot be

umpire to debates concerning harmless, empty shadows," but that in determining whether it should proceed, it must not "close [its] eyes to reality." *Poe v. Ullman*, 367 U.S. 497, 508 (1961). Mr. Justice Frankfurter, writing for the plurality, then noted that

> [j]usticiability is, of course, not a legal concept with a fixed content, or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought. *Id.* at 508-09.

Petitioners are simply asking this Court to close its eyes to reality and to preclude the requesting parties from having their day in the court of their choosing because of assumed limitations imposed by Article III. Neither their authorities nor sound policy dictates any such effect for Article III's requirement of a live case or controversy, and the court of appeals properly held that Article III did not prevent this case from going forward.

II. THE FILING OF A COMPLAINT IN DELAWARE DID NOT PRECLUDE THE ADJUDICATION OF THIS CASE IN THE DISTRICT OF COLUMBIA.

A. In Determining Whether This Case Is Precluded by the Delaware Action, the Court's Focus Should Be On The Cases As They Stood When This Action Was Filed, Disregarding The Issuance Of The Automatic Restraining Orders in Delaware.

In the present posture of this case, there is a permanent injunction in Delaware which has been affirmed by the Third Circuit, and no litigation has yet taken place on the merits in the District of Columbia. Under these circumstances, according to petitioners (Br. 32-33), this case should not proceed because to do so would be to litigate in the face of a "final decree" entered in another court of equal jurisdiction. Of course, the principal reason that there has been no litigation on the merits in the District of Columbia is that the manufacturers and the CPSC have used all of their skill and legal resources, virtually from the moment that this case was filed, to prevent any adjudication in the District of Columbia and instead to obtain a decision from the Delaware court.

In our view, the effect to be given the Delaware actions should turn on their status as of the date that the instant action was filed, and not as of the present time. Fundamental notions of fairness ought to preclude petitioners and the CPSC from relying upon the *fait accompli* of having obtained a permanent injunction, for which they are responsible and over which the requesters had no control, to shift the focus to the present situation. Indeed, in a number of cases, this Court has not allowed the advanced stage of litigation to influence its outcome where there are fundamental errors regarding important rights. *See, e.g., Trainor v. Hernandez*, 431 U.S. 434 (1977) (injunction against unconstitutional state statute set aside for failure to abstain due to pending state case); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (declaration of unconstitutionality of federal statute overturned for lack of standing); *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961) (judgment of escheat set aside because state court had no power to protect stakeholder from claims of other states).

The efforts of petitioners and the CPSC to have this Court focus on the current status of the Delaware action follows naturally from their earlier efforts in the trial court to rely on the issuance of temporary restraining orders to buttress their claims that the District of Columbia action should be stayed. Both parties have renewed that reliance in this Court, citing the existence of outstanding court orders in Delaware as the basis for a separate legal argument, *i.e.*, that requesters have no cause of action under the FOIA. It is their contention that the FOIA only permits a court "to order the production of any agency records improperly withheld," 5 U.S.C. § 552(a)(4)(B), and that records withheld pursuant to a court order are not "improperly withheld" within the meaning of the Act. (Pet. Br. 30-38; CPSC Br. 15-18). Apart from the fact that the courts have not read the jurisdictional grant of section 552(a)(4)(B) in so narrow a manner,[8] the argument is inapposite at least

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[8] The jurisdictional provision has been interpreted as providing review for a violation of any command of the Freedom of Information Act. *American Mail Line, Ltd. v. Gulick*, 411 F.2d 696, 701 (D.C. Cir. 1969). *See, e.g., Diapulse Corp. v. Food and Drug Admin.*, 500 F.2d 75 (2d Cir. 1974) (violation of search fee provision of section 552 (a)(4)(A)). Moreover, in *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 19 (1974), this Court observed that the district court is "the enforcement arm of the statute" and that "there is little to suggest, despite the Act's pri-

in this instance because of the nature of the orders relied on.

This is not a situation where there was a final judgment in a case concluded long before the instant action was filed, such as those cited by the manufacturers on pages 32-33 of their brief. The orders relied on as the linchpin for their argument are the temporary restraining orders issued in the twelve reverse cases almost immediately after they were brought. However, the manufacturers concede, indeed they strongly argue, and the CPSC does not disagree, that both the government and the district courts had no choice in granting such orders: "The need for TROs to prevent the whole matter from becoming moot was so obvious that the entry of such orders by the Delaware District Court was certain, and therefore opposition plainly would have been fruitless." (Pet. Br. 29, n.17). Whatever the impact of the "improperly withheld" language might be in a case which was fully litigated to a final judgment before the requesters filed their own suit in another jurisdiction, the circumstances of this case are very different.

All that had happened in Delaware when this case was filed was the issuance of a temporary restraining order, without any opposition or serious likelihood of denial. In fact, since obtaining a temporary restraining order is virtually automatic in these situations, the position of petitioners and the government transforms the filing of the complaint into the decisive factor in the "improperly withheld" argument. But that argument is little more

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mary purpose, that Congress sought to limit the inherent powers of an equity court." *Id.* at 20. Presumably included in these equity powers is the authority to direct the parties to stay identical litigation pending in another court. *See Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403 (5th Cir. 1971).

than another way of stating petitioners' view that their victory in the race to the courthouse provides them with the sole right to determine the forum in which these cases shall be litigated. Therefore, at least in the context of this case, the "improperly withheld" argument is not a separate legal theory, and accordingly it will not be discussed further by requesters.

Another reason why this Court should view this case as it stood when it was filed is that unless that is the focus, its value as guidance for requesters, submitters, government agencies, and the lower courts in future comparable situations will be minimal. Thus, this case merits review by this Court not only because of the possibility of conflicting orders in the present situation, but because similar situations are likely to arise in the future, and only a definitive ruling of this Court can prevent a repetition of the procedural litigation that has taken place here.[9] In fact, if this Court should grant the CPSC's petition for a writ of *certiorari* from the Third Circuit's decision, and decide the issue presented there, it will do so before this case can ever be litigated in the District of Columbia no matter what happens in this case in this Court. Regardless of whether the requesters would be legally bound by a decision affirming the Third Circuit (see pp. 34-41, *infra*), *stare decisis* would surely place a nearly insurmountable barrier in their path. The requesters might also have been equally foreclosed, as a practical matter, if the submitters in *Pierce & Stevens Chemical Corp. v. Consumer Product*

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[9] The same legal issue might also arise if the court in the second case entered an order restraining the parties from litigating the first case in which only some of the interested parties were joined. In both situations, the issue is identical: must the second court automatically defer to the first?

Safety Comm., 585 F.2d 1382 (2d Cir. 1978), the case which is in conflict with the decision of the Third Circuit, had obtained review by this Court and won a reversal.[10]

Therefore, the appropriate question for this Court is whether the filing of the reverse FOIA complaints in Delaware and three other jurisdictions automatically requires the District of Columbia court to hold all proceedings in abeyance until the earlier cases are finally decided in this Court? The effect of an affirmative answer would be to require the requesters to go to Delaware or to lose their right to participate in the litigation. Stated another way, the question becomes, does the race to the courthouse decide in which forum the contest between submitters and requesters will be litigated, even though the requesters have no idea which submitters will contest the CPSC's ruling until after a reverse case is filed?

B. The Doctrine of Comity Relied on By Petitioners and the CPSC Is Inapplicable.

1. Because the Requesters Are Not Parties in Delaware, Due Process Precludes the Requesters From Being Bound By A Judgment There.

The legal basis for the argument of petitioners and the government that the Delaware cases should be litigated and the District of Columbia case be stayed is the doctrine of

[10] Of course, if this Court were to reverse the Third Circuit's decision on the merits, that would not end the proceedings in Delaware, since the manufacturers raised a number of alternative claims for withholding which were not decided below. *See* Pet. App. A88-89. However, this Court's ruling in this case would, as a practical matter, determine whether on remand to the Delaware court, any further proceedings should be transferred to the District of Columbia.

"comity." Founded on notions of sound judicial administration, it "requires that when two identical actions are filed in courts of concurrent jurisdiction, the one which first acquired jurisdiction should be the one to try the lawsuit. The purposes of the rule are to avoid unnecessarily burdening courts and to avoid possible embarrassment from conflicting results." *Great Northern Ry. Co. v. National Railroad Adjust. Bd.*, 422 F.2d 1187, 1193 (7th Cir. 1970). The rule of comity is not an ironclad one, and upon a showing that the "balance of convenience [is] in favor of the second action" or that there are other "sound reasons" for not proceeding in the first case, the general principle will not be followed. *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1202, 1203 (2d Cir. 1970); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407 (5th Cir. 1971) (first case proceeds in the "absence of compelling circumstances," but even then the first court is obligated to make an examination to be certain that the rule is properly applied).

More importantly, the doctrine applies only when the parties are the same in both actions, *Great Northern Ry., supra,* and since the requesters were not named or attempted to be joined in Delaware, the doctrine is inapplicable here. The principal reason that comity cannot be applied where there is no identity of parties is that considerations of due process preclude binding a person to a judgment in an action in which he or she is not joined:

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications

of the identical issue which stand squarely against their position.

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971). Due process objections have required that this Court set aside a determination to escheat funds by the Pennsylvania Supreme Court where the State of New York was not joined as a party. *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 80 (1961); *see also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968) ("Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered.") Moreover, as this Court recently noted in *Parklane Hosiery Co. v. Shore*, 99 S.Ct. 645, 649 n.7 (1979): "It is a violation of due process for a judgment to be binding on a litigant who was not a party nor a privy and therefore has never had an opportunity to be heard." Since the doctrine of comity is intended to be used to avoid duplicative litigation, it has no function where, for due process reasons, the second action must go forward in any event.

2. The Exceptions To The Requirement That The Parties To Both Actions Be Identical Do Not Apply.

Both petitioners and the government cite cases which they contend constitute an exception to the due process requirement that a party must be before the court to be bound. *See, e.g., Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974); *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977); and *Gregory-Portland Independent School Dist. v. Texas Education Agency*, 576 F.2d 81 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 1423 (1979). First,

it must be noted that none of those cases involves the application of the doctrine of comity in order to decide, at the outset, which of two nearly simultaneously filed cases should go forward; they are all cases where there has been a final judgment entered, and the issue is whether that prior judgment is binding against non-parties.

Second, whatever the merits of those cases may be, they must be evaluated in light of this Court's recent decision in the *State of Montana v. United States*, 99 S.Ct. 970 (1979), in which the Court concluded that the United States, while not technically a party to an earlier proceeding, would be bound because of an intimate connection with, and indeed actual control over, the litigation. The case is particularly noteworthy for the extraordinary lengths to which the Court went before finding that the United States was bound by the prior action which the government had directed and financed in the name of a private party who had contracted with it. *Id.* at 972. Thus, after noting that there were seven specific facts demonstrating that the United States controlled the prior action from its inception to a withdrawn appeal in this Court, the Court concluded that the government might be bound despite not having been a formal party where it had a direct financial or proprietary interest in the prior litigation. *Id.* at 974-75. Even then, this Court suggested that there may be "other special circumstances" that would justify an exception even where there has been prior control. *Id.* at 975. It is therefore apparent, based on *State of Montana*, that any exception to the rule on binding non-parties is a very narrow one which should be applied only with the greatest caution.

Whatever the scope of that exception may be, there are at least two compelling reasons why it should not be ap-

plied here. Whenever a court has bound a non-party, it has concluded that there was adequate representation by existing parties, including generally a finding that there was a unity of interest between them or actual or substantial control by the non-party over an actual party to the earlier litigation. Petitioners and the CPSC argue that this test is met here because the government is adequately representing the requesters in Delaware despite the fact that "in most reverse cases, the government can be accurately characterized as a mere 'stakeholder,' . . ." G. English, *Protecting the Stakeholder: Defense of the Government Agency's Interests During Reverse FOIA Lawsuits,* 1 Admin. L. Rev. 151 (1979). Without attempting to second-guess the strategy of the government here, but solely to demonstrate the divergence of interests between the requesters and the government, it is useful to review the government's conduct to determine whether the representation was sufficient to satisfy due process.

At the outset, the government consented to a number of temporary restraining orders and then, contrary to the specific dictates of Rule 65(b), first permitted the two ten-day restraining orders to be extended for more than two and a half months, until the hearing on the preliminary injunction on July 23, and then continued them until the Delaware court ruled on the preliminary injunction, which was not until late October. Thereafter, while the government may well have correctly perceived that an appeal of the preliminary injunction would not succeed, it nonetheless did nothing to convert the preliminary order into a final one for nearly two years, it allowed the case to be closed for "statistical purposes" (A. 45), and then it sought to reopen the case and obtain a final appealable order only after the Court of Appeals for the D.C. Circuit handed down its first decision in the instant action,

directing the District of Columbia case to proceed on the merits.

In addition, the CPSC wholly failed to take any action to attempt to bring all of the parties into a single forum either in Delaware or the District of Columbia. It neglected the opportunity for joinder under Rule 19, even after the issue was fully briefed and relied upon by the D.C. Circuit. It moved to transfer the Delaware action to the District of Columbia only after the D.C. Circuit's first decision was handed down, although two years before it had moved to transfer five other actions to the District of Delaware from other districts where they had been filed. Not surprisingly, its tardy transfer motion was denied by the district judge in Delaware as untimely, particularly in light of the CPSC's prior representation that transfers to Delaware were to an appropriate forum, even after this case had been filed in the District of Columbia. (Pet. App. A115). And when the requesters attempted to raise Rule 19 on appeal to the Third Circuit, not only did the government disagree with the position taken, but it urged the court to reject the *amicus* brief that requesters sought to file on that issue. Moreover, the CPSC steadfastly opposed the requesters' efforts to have this litigation concluded in the District of Columbia when it was plainly in their interest to do so.

The point of all of this is not, of course, to question whether the litigation strategy of the government was adequate from the point of view of its interest; this history simply demonstrates that the government's interest and that of the requesters are very different.[11]

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[11] Besides differing on questions of strategy, and despite their ultimate agreement of the issue of disclosability, the CPSC failed to raise the principal issue briefed by the *amicus* Consumer Federa-

Given this history, it is difficult to contend that the representation of the requesters by the CPSC in Delaware was sufficient to satisfy the requirements of due process. Indeed, even the government concedes that in some cases its representation of requesters may be inadequate (Br. 37), although it argues vigorously that it was satisfactory here. Its position seems to be that the question should be examined separately in each instance, yet such a case-by-case analysis would inevitably lead to extraordinary amounts of litigation and attempts to second-guess strategies. Would it, for example, be incumbent on the government to appeal, even to this Court, every adverse decision in order to establish the requisite adequate representation? Or would the presumption be that the representation was always inadequate because of the government's role as a mere stakeholder?

We respectfully suggest that in the context of the Freedom of Information Act, those questions simply ought not to be asked, since they will produce both unnecessary litigation and answers which do not solve the fundamental problem of selecting the appropriate forum. Indeed, even in areas in which the governmental interest and the private interest are not nearly so adverse as they are here, such as the antitrust field, this Court has not bound private parties to the results obtained by the government: "Of course, a consent judgment, even one entered on behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of non-parties." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 99

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tion of America in the Third Circuit, *i.e.*, whether the statute relied upon by the petitioners, 15 U.S.C. § 2055(b)(1), is a statute that falls within Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3).

S.Ct. 1551, 1559 (1979). It would, we submit, be more than a little ironic to assume that, although Congress enacted the Freedom of Information Act in order to prevent agencies from withholding records from the public, (see Pet. Br. at 34; CPSC Br. at 17), yet when there is litigation over disclosure, the agencies can adequately represent requesters in reverse FOIA actions brought by submitters.[12]

C. Sound Reasons of Policy Support the Conclusion of the Court of Appeals To Decline To Resolve the Question of the Appropriate Forum for this Litigation by a Race to the Courthouse Alone.

One reason for declining to apply comity in this case is that it gives an overwhelming advantage to the submitters in selecting a forum for the litigation.[13] Forum shopping is generally undertaken either to obtain the anticipated benefits of a court that is expected to rule favorably to the litigant, or to have the case tried in a place that is

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12 Petitioners (Br. 53), but not the CPSC (Br. 27, n.13), rely on dictum in this Court's opinion in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 114 (1968), suggesting that a non-party might be bound because "he had purposely bypassed an adequate opportunity to intervene" as another reason for reversing the decision below. Given the breadth of the opportunity to intervene today in federal courts under Rule 24, that statement in *Provident* cannot be read as broadly as petitioners urge. Moreover, since requesters filed their own action joining all parties four days after the May 1st deadline, their conduct cannot fairly be described as having "purposely bypassed" an opportunity to litigate, unless one assumes the conclusion that the requesters had no choice but to intervene in Delaware.

13 *But see* pp. 44-45, *infra*, regarding the likely consequences of such a ruling in future "race" situations.

nearer to witnesses and counsel, thereby reducing both cost and inconvenience. While it is true that in this case the disadvantages to the requesters based on the location of the proceeding in Delaware are not very severe, other cases have already forced requesters from California to intervene in Virginia in order to protect their rights. *See Westinghouse Electric Corp. v. Schlesinger*, 392 F. Supp. 1246 (E.D. Va. 1974), *aff'd*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977). In other cases, requesters may simply have abandoned any effort to protect their interests because of the inconvenience and expense involved. Since choice of forum can be an important ingredient in litigation, particularly if the only opponent in the action views its role as a "stakeholder," the courts should not use the mechanical first-to-file rule embodied in the doctrine of comity unless it is a neutral principle. However, a brief review of the history of this litigation demonstrates that a race to the courthouse produces a result that is fixed in favor of the submitters.

Until March 28, 1975, the day that the CPSC announced its decision, there was no dispute between the requesters and the CPSC because there had been no decision on whether to disclose. Of course, the requesters could have viewed the prolonged delays, including the failure to meet the mid-March deadline, as a denial of their request, but they chose to allow the administrative process to work its course. Thus, until there was a decision, there was no certain dispute between the requesters and the CPSC, nor for that matter between the submitters and the CPSC. Under the race-to-the-courthouse theory of resolving forum shopping disputes, at the moment that the CPSC decided to release the documents, "the race was on." But at that point the only contestants in the race were the submitters since they were

the only ones who knew whether or not they would object.[14] Because the requesters had no known dispute with any manufacturer, there surely would have been no case or controversy between the requesters and the CPSC at that time. In other words, this race, if it is dispositive, was fixed: only the manufacturers knew whether there was going to be a dispute and therefore only they could win. Whatever application the notion of a race to the courthouse may have in resolving disputes about which federal forum should hear a particular litigation, no case has ever allowed the winner of the race to prevail when the loser is running with an absolutely insurmountable handicap.

In a similar situation this Court has rejected an attempt by the holder of a patent to stretch the Declaratory Judgment Act "to give him a paramount right to choose the forum for trying out questions of infringement and validity." *Kerotest Mfg. Co. v. C-O-TWO Fire Equipment Co.*, 342 U.S. 180, 185 (1952). As Mr. Justice Frankfurter observed, the holder is "given an equal start in the race to the courthouse, not a headstart." *Id.* There is nothing in the FOIA or any of the statutes relied upon by petitioners to indicate they should receive a headstart. *See Chrysler Corp. v. Brown*, 99 S.Ct. 1705 (1979) (FOIA gives no rights to submitters). On the other hand, at least one court has suggested that requesters of information under the FOIA should be given "whatever advantages are conferred on [them] by statute." *Schwartz v. Internal Revenue Service*, 511 F.2d 1303, 1307 (D.C. Cir. 1975). Therefore, given the lack of neutrality in the first to file rule, and the absence of any indication that Congress intended to prefer submitters over requesters in forum shopping disputes, the

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[14] In fact, three submitters never did object (A. 37, n.6), and one manufacturer who filed suit subsequently withdrew it and permitted its documents to become public. (Pet. App. A109, n.1).

issue should not be resolved by a race to the courthouse alone.

Not only is there no authority that supports this unwarranted extension of the doctrine of comity, its application in these circumstances would raise serious questions of fairness and due process and will do nothing to solve the problem of judicial administration which, as the government recognizes, exists from the possiblity of concurrent litigation in reverse and direct FOIA cases. (CPSC Br. 11, 32-33). If the petitioners prevail here, the message to requesters will be clear: it is necessary to win the race to the courthouse to have an opportunity to litigate in the forum of your choice. Moreover, it will be clear that requesters cannot win the race once the agency has decided to release the documents, either because there would be no case or controversy, or because they would have filed too late. Requesters could win, however, if they sued early enough, and under the FOIA that would generally mean ten days after the request was filed unless the documents were actually made available.[15] The suit could then be brought immediately by the requesters yet, according to the CPSC (Br. 37), the submitters could not have sued first since they would not be certain that there would be a case or controversy or that any dispute would then be ripe. At worst, from the requesters' point of view, their action would be held in abeyance until the agency could conclude its administrative process, *see Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976), but their choice of forum would be preserved.

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15 *But see* 5 U.S.C. § 552(a)(b)(B) (additional delays allowed for "unusual circumstances").

Such a result would assure the requesters their choice of forum at very little cost to them since the filing of an FOIA complaint is an easy and inexpensive act to undertake for any reasonably sophisticated requester of information. Since the requesters will not know which submitters will object, there will be no point in naming all of them under Rule 19. Instead, any interested persons would have to intervene themselves, thereby making additional work for both the parties and the court. All of these procedures would create an unnecessary burden on agencies, submitters, requesters, and federal judges. Thus, the end result would be that, if winning the race means a choice of forum, a submitter can never win a race to the courthouse against a knowledgeable requester. The sole exception is the case now before this Court, in which the requesters did not accurately predict what would happen as a result of their willingness to allow the administrative process to proceed to its proper conclusion.

The government recognizes the existence of the forum-shopping problem, and suggests that the first-to-file rule is a simple one and should be adopted for that reason. (Br. 33-35). It acknowledges that the rule would provide an advantage to requesters in some races and submitters in others, and thereby views the rule as essentially a neutral one. Requesters agree with the CPSC (Br. 33) that the objective of any system designed to deal with this problem "should be to minimize the burdens on the judicial system as a whole and to accommodate the systemic interests of litigants without regard to their identity or status," but disagree that their "race to the courthouse" test will achieve this goal.

Despite the surface appeal of the race to the courthouse solution, requesters believe that the inflexibility of relying

on such races is the heart of the problem. In our view, rather than a rigid rule, the courts need the discretion to achieve results that are fair to the parties and that advance their own independent interests in judicial economy. This Court has recognized this need with respect to the Declaratory Judgment Act which created similar kinds of problems: "Wise judicial administration, giving regard to the conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid, mechanical solution of such problems." *Kerotest Mfg. Co., supra,* 342 U.S. at 183. By opting for flexibility rather than rigidity, equitable factors can be considered in an attempt to balance the competing interests of the parties concerned. *Cf. Penn General Casualty Co. v. Pennsylvania ex rel Schnader,* 294 U.S. 189, 197 (1935). Courts in these cases are acting as courts of equity, and, as this Court observed in *Hecht Co. v. Bowles,* 321 U.S. 321, 329-30 (1944), the

> "essence of equity jurisdiction has been the power of the Chancellor to do equity and mold each decree to the necessities of the particular case. Flexibility, rather than rigidity, has distinguished it. The qualities of mercy and practicality have made equity the instrument of nice adjustment and reconciliation between the public interest and the private needs, as well as between competing private claims."[16]

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[16] The Third Circuit recently declined to decide a forum shopping dispute based on the winner of the race to the courthouse, relying instead on the "interest of justice" standard in 28 U.S.C. § 2112(a) to resolve the matter. *United Steelworkers of America v. Marshall,* 592 F.2d 693 (1979). In so ruling, it noted that "[u]nlike race tracks, however, courts are not equipped with photoelectric timers . . . ." *Id.* at 695.

This Court has recognized in *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976), that in determining which federal district court should hear a case, "no precise rule has evolved [but] the general principle is to avoid duplicative litigation." Although that case involved conflicts between federal and state jurisdictions, the approach adopted there is, we submit, appropriate for this situation. It includes weighing such factors as convenience, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained. *Id.* at 818. "No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required." *Id.* at 818-19. Of particular relevance to this case is that, although the federal action was first filed in *Colorado River,* jurisdiction went to the state court because, as this Court noted, only the filing of the complaint had taken place in federal court, *id.* at 820, precisely the same act on which the petitioners and the CPSC would have everything turn in this situation.

D. More Satisfactory Means Are Available To Decide the Appropriate Forum for Litigation of This Kind.

Although petitioners and the CPSC have declined to recognize and utilize them, there are tools that are more than adequate for solving most of the problems of selecting an appropriate forum in reverse and direct FOIA cases, *i.e.,* the joinder requirements of Rule 19 and the transfer provisions of 28 U.S.C. § 1404(a).[17] While those two pro-

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[17] In *Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. 71, 77 (1961), this Court noted the availability of its original juris-

visions do not automatically guarantee a solution in every case, their flexibility offers the best chance to consolidate related litigation in one court, particularly in light of the fact that most governmental agencies can be sued by submitters in the District of Columbia, and the FOIA allows all actions under the Act to be brought there. *See* 5 U.S.C. § 552(a)(4)(B).[18] By way of contrast, it is highly fortuitous that all of the submitters were incorporated in Delaware so that all thirteen actions could be consolidated there. As noted above, p. 7, *supra,* no other factor favored litigation there, yet a rigid first-to-file rule would require the Delaware court to try these cases.

Rule 19 is an important tool in resolving these problems because it mandates consideration of three important interests: that of the defendant (the federal agency) in avoiding conflicting orders, that of the absent parties (either the submitters or the requesters as the case may be) in being heard, and the interest of the public and the courts in the efficient administration of justice and the avoidance of multiple litigation. *See Illinois Brick Co. v. Illinois,* 431 U.S. 720, 737-38 (1977). *See generally Provident Tradesmens Bank & Trust Co. v. Patterson, supra; Advisory Committee Notes to Rule 19,* 39 F.R.D. 89 (1966). In fact, the problems arose in this case because the manufacturers neither joined the requesters as required by Rule 19(a), nor complied with Rule 19(c) by explaining the reason for their nonjoinder. Additionally, although required to do so on its own

diction under Article 3, Sec. 2 of the Constitution that "wisely provided a way in which controversies between states can be settled without subjecting individuals and companies affected by those controversies to a deprivation of their right to due process of law." *See also* 28 U.S.C. § 1335 (Federal Interpleader Act).

[18] Of course, Congress might provide for other legislative solutions that could eliminate these problems. *See* 26 U.S.C. § 6110(f).

motion, see *Provident, supra,* 390 U.S. at 111, the Delaware court did not inquire into the absence of the requesters. Nor did the government ever raise the Rule 19 issue even though it was plainly in its interest to attempt consolidation by any means, and it sought to avail itself of the transfer provisions of section 1404(a) only two and a half years after the Delaware suits were brought when the District of Columbia Circuit directed that the action there proceed on the merits.

The proper question, we submit, is not why the requesters did not intervene in Delaware, but why no one in Delaware made an effort to join them there, especially in light of the liberal service of process provisions of Rule 4(f) of the Federal Rules of Civil Procedure.[19] If all of the parties had been joined in a single forum, as they were in the District of Columbia, none of this litigation would have taken place. While it is understandable why the manufacturers would prefer to litigate against the stakeholder, rather than against those parties with truly adverse interests, there is no excuse for the CPSC's refusal to take adequate steps to avoid these difficulties. Permitting the action to proceed in the District of Columbia would not, as the petitioners and the government suggest, have resulted in the court refusing to permit a victorious party to enforce a final judgment. At most, a stay of the proceedings in Delaware would have been ordered, as has been done so often when similar suits are pending in different federal courts. Any interference with an "automatic" temporary

[19] Although declining to vacate the judgment below, the Third Circuit recognized that the interest of requesters "in the subject matter of this lawsuit is clear, and their joinder as parties in the district court would have been desirable. . . ." *GTE Sylvania, Inc. v. CPSC, supra,* 598 F.2d at 799.

restraining order of another court would hardly constitute the kind of serious failure to grant deference to the actions of a concurrent federal jurisdiction of which the petitioners and the CPSC complain so bitterly. If there is, as the government suggests (Br. 31, n.17), no case in which a federal court has ordered a litigant *not* to enforce an order of a coordinate court, it is because no one has sought to do so based upon the temporary restraining orders which are the foundation of petitioners' case here.

Had an effort been made to join the requesters in Delaware, and such effort been successful, requesters could have made a motion to transfer under 28 U.S.C. § 1404(a), and the court would have had to weigh the convenience and other factors that are relevant on such a motion. But having been joined under Rule 19, they could still make that motion, whereas if they intervened, they would have forfeited their right to seek a transfer to the District of Columbia. *See e.g., Commonwealth Edison Co. v. Train,* 71 F.R.D. 391, 394 (N.D. Ill. 1976). Even if they were not joinable in Delaware, as will occur in a number of cases, the government could seek a transfer, and if that were denied, Rule 19(b) would still be employed to determine whether the action should proceed. In such a case, the availability of another forum where all parties could be joined would be highly relevant. *Caldwell Mfg. Co. v. Unique Balance Co.,* 18 F.R.D. 258, 265 (S.D.N.Y. 1955). If despite the best efforts of the courts, the agency, and the submitters, all interested parties could not be joined in a single district, the action brought by the submitters might nonetheless proceed, with or without the intervention of the requesters. While requesters believe that principles of due process would preclude a decision in Delaware made in their absence from binding them, the *stare decisis* effect of that ruling would nonetheless be considerable, and it

would hardly leave the submitters with a wholly useless decree. Even though a court of equity "cannot lawfully enjoin the world at large, no matter how broadly it words its decree," *Alemite Mfg. Corp. v. Staff,* 42 F.2d 832 (2d Cir. 1930) (L. Hand), it still would be able to issue an order that would give substantial although not total protection to a submitter who emerged victorious in a reverse FOIA case in which, despite the good faith efforts of the submitter, a known requester could not be joined.

Although requesters believe that Congress intended that their rights be given great weight in controversies such as this, they recognize that in come cases fairness will dictate that the interests of submitting parties need to be accommodated. They believe, moreover, that the result which they urge in this case would provide the needed flexibility to achieve justice in such a case. Thus, if a requester who had tired of agency delay had filed suit, there might be an occasional case in which the requester's choice would not be automatically honored, and the equities would have to be balanced considering the alternatives available through Rule 19 and section 1404(a). In our view, there is no more reason, for example, to allow individuals residing in Alaska seeking access to the personal files of the FBI on Dr. Martin Luther King, Jr. which are in Washington, to have the absolute right to have that issue litigated in Anchorage, where there is reason to doubt the vigor of the defense that may be raised, than it is to tell an academic researcher living in the District of Columbia who is investigating corporate bribery that he or she must go to California to litigate access to the documents that Lockheed submitted to the Securities and Exchange Commission regarding its overseas payments.

Of course, in many cases in which either the requester or the submitter has won the race to the courthouse, the

"loser" may be willing to allow the government to defend its interest when there is a reasonable expectation that the representation will be adequate, and/or where the party is unable to obtain independent counsel to provide assistance. But when, as here, a party has expressly denied the adequacy of the government's representation by filing its own lawsuit within four days of the earliest possible date on which the extent of the controversy could be known, the courts should adopt a flexible approach to the situation and presume that the action should proceed in the forum required by the interests of justice, rather than where a race to the courthouse is won by the only side allowed to enter.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ALAN B. MORRISON
DIANE B. COHN
DAVID C. VLADECK

Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for the Respondents Consumers Union of the United States, Inc. and Public Citizen's Health Research Group

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